

REMARKS/ARGUMENTS

The rejections presented in the Office Action dated January 14, 2009, (hereinafter Office Action) have been considered but are believed to be improper. Reconsideration of the pending claims and allowance of the application in view of the present response is respectfully requested.

Applicant respectfully traverses each of the rejections (§§ 102(e) and 103(a)), each of which is based upon the teachings of U.S. Publication No. 2007/0155494 by Wells *et al.* (hereinafter “Wells”), because Wells has not been shown to be “prior” art with respect to the instant application. Notably, the filing dates of both Wells and Wells’ parent application (now U.S. Patent No. 7,208,669) are subsequent to the filing date of the instant application as acknowledged at page seven of the Office Action. While Wells may claim priority to a provisional application filed on August 25, 2003, in order to rely on that provisional filing date for the purposes of a § 102(e) rejection, the provisional Wells application (Prov. No. 60/497,453) needs to properly support the subject matter relied upon in Wells. *See*, MPEP § 2136.03(III) (8th ed., rev. 7, July 2008). However, the Office Action fails to demonstrate, or even assert, that the relied-upon teachings are properly supported by the Wells provisional application as required.¹

In general, Wells does not directly correspond to the provisional Wells application such that support for the citations to Wells is not readily identifiable. More specifically, using the rejection of Claim 5 as an example, the Wells provisional application does not appear to include any description of the relied-upon sensing unit 217 in paragraph [0160] of Wells. Without a presentation of proper support in the Wells provisional application for each of the relied-upon teachings of Wells, Wells cannot be afforded the benefit of the

¹ *See, e.g.*, Ex parte Nobuhiko Ota, Toshikazu Hamao and Yoshifusa Tsubone, 2006 WL 2851414 (Bd.Pat.App. & Interf.), providing an example where the Board of Patent Appeals remanded an application to the Examiner to “explain how and where that provisional application supports, in the manner provided by § 112, first paragraph the subject matter of the relied upon Gabrys’ patent invention such that a § 102(e) date based on that earlier provisional application filing may be accorded the Gabrys’ patented subject matter relied upon by the Examiner in rejecting the claims.”

provisional filing date. Thus, Wells has not been shown to be “prior” art upon which a § 102(e) rejection of the pending claims could be based. Therefore, each of the rejections is improper, and Applicant accordingly requests that each of the rejections be withdrawn.

Consistent with the above-referenced Board decision, Applicant will consider appealing the rejections if the rejections based on Wells are maintained without the requisite showing of support in the provisional application.

With respect to the rejection of dependent Claims 22 and 23, the further reliance on the teachings of U.S. Publication No. 2002/0016203 by Nagata *et al.* (hereinafter Nagata”) does not overcome the above-discussed deficiencies in the teachings of Wells. For example, Nagata has not been shown to teach the limitations asserted as being taught by Wells. Since Wells has not been qualified as prior art and Nagata fails to teach or suggest these claim limitations, any combination of the teachings of Nagata with those of Wells would not properly correspond to such limitations. Thus, the § 103(a) rejection of dependent Claims 22 and 23 should further not be maintained. Applicant accordingly requests that the rejection be withdrawn.

It should be noted that Applicant does not acquiesce to the Examiner’s statements or conclusions concerning what would have been obvious to one of ordinary skill in the art, obvious design choices, non-functional limitations, intended use, common knowledge at the time of Applicant’s invention, officially noticed facts, and the like. Applicant reserves the right to address in detail the Examiner’s characterizations, conclusions, and rejections in future prosecution.

Authorization is given to charge Deposit Account No. 50-3581 (NKO.063.WUS) any necessary fees for this filing. If the Examiner believes it necessary or helpful, the undersigned attorney of record invites the Examiner to contact the undersigned attorney to discuss any issues related to this case.

Respectfully submitted,

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Date: February 26, 2009

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